

CALIFORNIA DEPARTMENT OF TRANSPORTATION

IBLA 88-99, 88-100

Decided October 25, 1989

Appeals from decisions of the Barstow Resource Area Office, Bureau of Land Management, rejecting free-use permit applications CA-060-FP6-55 and CA-060-FP6-54.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness--Federal Land Policy and Management Act of 1976: Permits--Applications and Entries: Generally

BLM properly denied approval of two free-use applications for sand and gravel aggregate excavation within a wilderness study area where impacts of the excavation could not be rendered substantially unnoticeable before a final wilderness designation was scheduled to be made pursuant to 43 U.S.C. § 1782 (1982).

APPEARANCES: R. E. Longstreet, Chief, Engineering Services, District 8, California Department of Transportation, San Bernardino, California.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The California Department of Transportation (Caltrans) has appealed from two decisions of the Barstow Resource Area Office, Bureau of Land Management (BLM), rejecting free-use applications CA-060-FP6-54 and CA-060-FP6-55. Application CA-060-FP6-54 (IBLA 88-100), for the Afton pit, was rejected by decision dated October 2, 1987. Application CA-060-FP6-55 (IBLA 88-99), for the Opah Ditch pit, was rejected by decision dated August 4, 1987. Both applications were made to permit excavation of sand and gravel pits in the Soda Mountains Wilderness Study Area (WSA 242). BLM rejected the applications because it found the proposed excavations incompatible with its nonimpairment criteria for management of wilderness study areas. Because similar issues are involved, these two appeals were consolidated for decision on appeal.

On June 27, 1986, Caltrans filed two applications to remove aggregate and common material to be used for highway resurfacing. At both sites alluvium would be scraped to a depth of as much as 10 feet. Existing access would be used. At the Afton pit, appellant proposed to remove 300,000 tons

of aggregate and 5000 cubic yards of fill material from the E\NW^, E\SW^, SE^, W\NE^ sec. 22, the NW^ sec. 26, and N\NE^, sec. 27, T. 12 N., R. 5 E., San Bernardino Meridian. An associated processing plant was proposed and about 25 acres would be disturbed. All but approximately 6 acres of the Afton pit and most of the Afton processing plant site lie within the WSA.

At Opah Ditch, appellant proposed to remove 300,000 tons of aggregate and 5,000 cubic yards of fill material from about 15 acres, in the W\ sec. 25 and the E\ sec. 26, T. 13 N., R. 7 E., San Bernardino Meridian. The Opah Ditch site lies entirely within the WSA.

Both areas had been excavated for aggregate and common material before 1976. Permits for the extraction of sand and gravel were approved for both areas in 1981, although the Afton site was not then used. The Opah Ditch site was mined by methods similar to those proposed here, using bulldozers, scrapers or front-end loaders, and the resulting pit was reclaimed in 1983.

On September 23, 1986, a BLM field examination of the reclaimed Opah Ditch pit revealed that very little vegetation had returned 3 years after reclamation of the pit was completed. Photographs taken during the field examination show sparse vegetation in the vicinity of the pit with discernibly sparser vegetation growing inside the reclaimed pit.

On May 28 and June 10, 1989, BLM prepared environmental assessments (EA's) for the proposed permits at both locations in the WSA. Each site lies at the mouth of a wash in an area of creosote bush scrub vegetation on desert alluvium, with no developed mature soil profiles. The pit at the Opah Ditch site was used as an indicator of the regeneration potential of both sites. Considering the condition of the refilled and regraded pit at Opah Ditch 3 years following reclamation, it was estimated that natural revegetation of the proposed excavations would take at least 20 years, primarily because of low rainfall.

Possible mitigating measures at both proposed pits were discussed by BLM, including reclamation of route improvements and regrading of excavations. It was concluded that stockpiled soil risked early seed germination prior to resspreading, and was considered an unproven mitigation method of reclamation. An almost identically unfavorable analysis of vegetative mitigation was made by each assessment, concluding that:

Impacts to wilderness values could not be realistically mitigated. Seeding and/or irrigation disturbance to accomplish revegetation in the desert environment is very costly. Although a site specific analysis has not been completed, it is unlikely that such rehabilitation measures would be cost effective for the State Department of Transportation.

There is no way to mitigate the complete removal of the existing plant community. A county reclamation plan prepared in 1979 states that several sensitive plant species would be transplanted to other areas before mining begins. The practicality of

this is questionable, except for the hardy cactus species. Prior to excavation operations, a cacti census could be undertaken, and the cacti transplanted outside of [the] proposed pit area. In general, reseeding has been found to be unsuccessful in the desert.

(Opah Ditch EA at 4.1.2.)

Both decisions under review concluded that excavation of aggregates and common materials as proposed would not meet WSA management standards set by the "Interim Management Policy and Guidelines for Lands Under Wilderness Review" (IMP), because impacts of the proposed pits and surface disturbance could not be timely reclaimed. See 44 FR 72014, (Dec. 12, 1979), as amended 48 FR 31854 (July 12, 1983). Therefore, BLM denied the Caltrans applications. In statements of reasons filed in both appeals, Caltrans proposed that mitigating measures be used at both sites, to include transplanting or other landscaping, and stated that use of alternative material sites located 35 and 49 miles away from the road would create "uneconomical and energy-wasteful hauling problems."

Section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(a) (1982), directs the Secretary of the Interior to review roadless areas of 5,000 acres or more identified during wilderness inventory of the public lands as having wilderness characteristics, and report to the President those areas suitable or unsuitable for preservation as wilderness. 43 U.S.C. § 1782(c) (1982) sets standards for managing a WSA during wilderness review; the Secretary of the Interior must manage lands undergoing wilderness review in a manner that will not impair the suitability of these areas for preservation as wilderness.

While an area is under wilderness review, and until Congress acts on WSA designations, BLM manages WSA's pursuant to the IMP. The Wilderness Society, 106 IBLA 46 (1988); L.C. Artman, 98 IBLA 164 (1987). The IMP out-lines nonimpairment criteria for BLM management of wilderness study areas at Chapter I. B. 2. An activity is not impairing if it is temporary, capable of being reclaimed to a condition of being substantially unnoticeable by the time the Secretary of the Interior is scheduled to send recommendations to the President, and, if after any needed reclamation is complete, the area's wilderness values have not been degraded so far as to significantly constrain the Secretary's recommendation with respect to the area's suitability or unsuitability for preservation as wilderness. 44 FR 72018 (Dec. 12, 1979).

The IMP requires that a temporary impact must be capable of reclamation to a substantially unnoticeable condition by the time the Secretary is scheduled to send wilderness recommendations to the President. BLM determined this standard could not be met by Caltrans for either proposed pit. Caltrans disputes this finding, arguing that it will reclaim both pits. The issue before us on appeal is the same issue we confronted in L.C. Artman, supra: whether the proposed excavations would violate the nonimpairment standard. In L.C. Artman, we explained:

In their proposed [plan] modification, appellants vowed to undertake the necessary reclamation, including regrading and reseeding the excavated area, as well as planting, watering, and fertilizing. However, on appeal, appellants do not challenge BLM's conclusion that the area cannot be returned timely to a substantially unnoticeable condition. It is well established that appellants have the burden of overcoming BLM's factual conclusion by a preponderance of the evidence. \* \* \* Therefore, in the absence of any evidence to the contrary, we must conclude that BLM properly rejected appellants' proposed modification of their approved mining plan of operation. [Citation omitted.]

Id. 98 IBLA 168.

This is such a case. While Caltrans asserts that proposed mitigating measures would be undertaken, these measures involve the use of "transplanting or other measures" following excavation of the material sites. In both cases, BLM considered the possibility that impacts of excavation might be timely mitigated by transplanting and seeding, but concluded that such mitigation would not be effective, judging by past experience. Caltrans has offered no evidence to refute this conclusion, which rests upon field examination of similar past reclamation work at Opah Ditch.

To reach the conclusion stated, that excavation would so degrade the WSA that the pits could not be timely returned to a substantially unnoticeable condition, BLM reviewed the available information concerning both pits and determined that neither natural regeneration nor landscaping efforts would be sufficient to mask the excavations in the time available before a wilderness designation was scheduled to be made. Caltrans has offered no evidence to show that this determination was erroneous. We find that BLM considered the available evidence, correctly concluded that the proposed excavations would violate the nonimpairment standard in the IMP, and therefore correctly denied both applications. See L.C. Artman, supra at 168.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Barstow Resource Area Office are affirmed.

---

Franklin D. Arness  
Administrative Judge

I concur:

---

Will A. Irwin  
Administrative Judge